Supreme Court of the United States.

No. 153.—October Term, 1903.

The Winous Point Shooting Club, Plaintiff in Error,
vs.
Jeppe Caspersen, Peter Petersen, William Decker and Charles Petersen.

In error to the Supreme Court of the State of Ohio.

[March 7, 1904.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This was a suit brought by the Winous Point Shooting Club against Caspersen and others in the Court of Common Pleas, Ottawa County, Ohio, to enjoin defendants from fishing on certain premises alleged to be parts of Sandusky River and Mud Creek and to belong to plaintiff.

The court found that the waters in dispute formed part of a public bay, which defendants had the right to navigate and to fish in; and dismissed the petition.

The case was then carried to the Circuit Court of Ottawa County and there tried *de novo*. That court filed findings of fact and conclusions of law; held that the waters in question were not parts of Sandusky River and Mud Creek, and formed part of a public bay, in whose waters defendants as members of the public had the right of navigation and fishing; and the petition was again dismissed. Plaintiff then took the case on error to the Supreme Court of Ohio, and, with other alleged errors not material here, assigned as error that "the judgment of the court is in contravention of section 19, article I, of the constitution of Ohio, and article 5 of the Constitution of the United States, in that by said judgment the private property of the plaintiff in error is taken for public use without just compensation." There was no suggestion that any right under the Constitution, or any statute of, or authority exercised under, the United States, had been specially set up or claimed, and decided against. The Supreme Court affirmed the judgment of the Circuit Court and entered an order certifying as "part of the record in this case and of the judgment and entry of affirmance heretofore rendered and made herein, that in the prosecution of error to this court from the Circuit Court of Ottawa County, and in the arguments made in this court, in behalf of plaintiff in error, it was insisted and relied upon by said plaintiff that the waters in dispute had been surveyed and meandered by the United States as those of Sandusky River and Muddy Creek, and the lands mentioned

and described in said case had been surveyed, sold and patented by the United States to plaintiff's predecessors in title as lands bordering upon said river and creek, all of which acts had been done under authority of acts of Congress; that plaintiff had and possessed the sole and exclusive right of fishing in said waters; that the judgment and decree of the said Circuit Court, that said waters are not those of Sandusky River and Muddy Creek, but those of an open and public bay, in which the public had the rights of fishing, was in contravention of the Constitution of the United States, in that plaintiff was deprived of its private property and the same was taken for a public use, without just compensation to it; and it became material to the determination of said case in this court to determine said question so made by plaintiff in error, which was determined adversely to plaintiff in error, as appears in the entry and judgment of affirmance heretofore made herein."

The certificate in itself would not confer jurisdiction, but may properly be referred to, and it appears therefrom as well as from the terms of the assignment of error in the Supreme Court that plaintiff's contention was that the judgment of the Circuit Court was in violation of the Fifth Amendment. But that amendment is a restriction on Federal power, and not on the power of the States. The Supreme Court of Ohio gave no affirmative expression of its views in that regard, or, indeed, in respect of section 19 of article I of the constitution of Ohio, treating of taking private property for public use on compensation made.

The judgment was affirmed on the authority of *Bodi* v. *Winous Point Shooting Club*, 57 Ohio St. 226. In that case the same waters were in dispute as in this case, and it was held that they formed "part of a public bay and not parts of the Sandusky River and Mud Creek," and the ruling in *Sloan* v. *Biemiller*, 34 Ohio St. 492, sustaining the public rights of navigation and fishing, in such circumstances, was followed and approved.

Federal questions cannot be raised here which did not arise below, and as the Fifth Amendment had no application the averment of its violation created no real Federal question. *Chapin* v. *Fye*, 179 U. S. 127.

Writ of error dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.